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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NOS. 40898 & 40901
Plaintiff-Respondent,)	
)	KOOTENAI COUNTY NO. CR 2009-
)	20230 & CR 2006-34
v.)	
)	
JERRY LEONARD ELLIS, II,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI

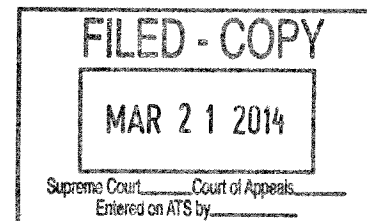
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STATEMENT OF THE CASE

Nature of the Case

Mr. Ellis timely appeals from the district court's order revoking probation. On appeal, Mr. Ellis argues that the district court abused its discretion when it denied his request for a continuance of the probation violation proceedings so he could retain private counsel. Mr. Ellis also argues that the district court violated his due process rights to notice, to prepare a defense, and to call witnesses on his behalf, when the district court denied his request for a continuance of the disposition portion of the probation revocation proceedings.

Statement of the Facts and Course of Proceedings

Mr. Ellis worked late into the morning and, after he completed his job, he had five beers with his co-workers. (Presentence Investigation Report (*hereinafter*, PSI), pp.2-3.) While driving home, he nearly missed hitting a police vehicle. (R, p.42.) The police officer activated his overhead lights, but Mr. Ellis did not yield. (R., p.42.) Mr. Ellis eventually got out of his car and ran into the woods. (R., p.42.) The police officer eventually subdued Mr. Ellis and subsequently arrested him. (R., pp.42-43.)

In docket number 40901 (*hereinafter*, First Case), Mr. Ellis was charged by information with driving without privileges, resisting and obstructing a police officer, and driving without privileges (*hereinafter*, DUI), with a felony enhancement for having been convicted of two prior DUI's in the previous ten years. (R., pp.70-71.) Pursuant to a plea agreement, Mr. Ellis pleaded guilty to the felony DUI and, in return, the State agreed to dismiss the remaining charges. (08/25/06 Tr., p.9, Ls.11-20; R., pp.78-81.)

Thereafter, the district court imposed an indeterminate sentence of three and one-half years, but suspended the sentence and placed Mr. Ellis on probation.¹ (R., pp.90-93.)

After a period of probation, the State filed a report of probation violation and two addendums alleging that Mr. Ellis violated the terms of his probation. (R., pp.115-117, 145-146, 162-163.) Mr. Ellis admitted to violating the terms of his probation by driving without privileges, failing to attend relapse prevention, residing at an unapproved residence, testing positive for amphetamine, being present at a residence where illegal substances were being consumed, lying to his probation officer, and consuming alcohol. (R., pp.115-117, 145-146, 167-169.) The district court then found that Mr. Ellis violated the term of his probation by refusing to provide a urine sample, and by failing to report to his probation officer. (R., pp.145-146, 176.) The district court revoked probation and retained jurisdiction. (R., pp.179-181.) Upon review of Mr. Ellis' period of retained jurisdiction (*hereinafter*, rider), the district court suspended the sentence and placed him on probation. (R., pp.187-191.)

After a second period of probation, the State filed a report of probation violation alleging that Mr. Ellis violated the terms of his probation. (R., pp.200-202.) Mr. Ellis admitted to violating the terms of his probation by consuming alcohol, and consuming methamphetamine. (R., pp.200-201, 240.) The district court found that Mr. Ellis violated the terms of his probation by failing to report to his probation officer. (R., pp.200-201, 241.) The district court continued the disposition of the probation violations. (R., p.243.)

While awaiting the disposition of the foregoing probation violations, the State filed a new case, docket number 40890 (*hereinafter*, Second Case), charging Mr. Ellis, by

¹ Mr. Ellis has completely served this sentence. (03/21/13 Tr., p.46, Ls.4-5.)

Information, with a felony DUI, an enhancement for two DUIs within fifteen years, and a persistent violator enhancement. (R., pp.304-306.) Pursuant to a plea agreement, Mr. Ellis pleaded guilty to a felony DUI and the enhancement for two DUIs within fifteen years, and, in return, the State dismissed the persistent violator enhancement. (R., pp.309-311.) In the First Case, the State also filed an addendum to the report of probation violation based on the charges in the Second Case. (R., pp.253-254.) Based on the guilty plea in the Second Case, Mr. Ellis admitted to violating the terms of his probation in the First Case. (R., pp.309-311.) At a consolidate hearing, the district court revoked probation and retained jurisdiction in the First Case. (R., pp.317, 320-322.) In the Second Case, the district court imposed a concurrent unified sentence of ten years, with five years fixed, and retained jurisdiction. (R., pp.317, 323-327.) Upon review of Mr. Ellis' second rider, the district court suspended the sentences and placed him on probation in both cases. (R., pp.333-346.)

After a third period of probation, the State filed, in both cases, a report of probation violation alleging that Mr. Ellis violated the terms of his probation. (R., pp.357-360.) Mr. Ellis admitted to violating the terms of his probation by consuming alcohol, purchasing alcohol, absconding, failing to pay costs of supervision and fees, failing to report for a random drug test, and failing to report to an appointment. (R., pp.357-360, 393-394.) Mr. Ellis also admitted to violating a term of his probation by missing an aftercare appointment. (R., pp.359, 393-394.) However, the district court noted that Mr. Ellis could not attend that appointment because he was in custody. (R., pp.359, 393-394.) Mr. Ellis was admitted into mental health court while awaiting the disposition of the probation violations. (R., p.407.) The district court revoked probation in both cases, but suspended the sentences and placed Mr. Ellis on probation with a

special probation condition requiring him to complete mental health court. (R., pp.409-414.)

After a fourth period of probation, the State filed, in both cases, a report of probation violation alleging that Mr. Ellis violated the terms of his probation. (R., pp.439-441.) Mr. Ellis admitted to violating the terms of his probation by failing to complete mental health court and driving without privileges. (R., pp.439-441, 449-450.) The district court revoked probation in both cases, and retained jurisdiction. (R., pp.453-454.) Upon review of Mr. Ellis' third rider, the district court suspended the sentences and placed him on probation in both cases. (R., pp.463-468.)

During Mr. Ellis' fifth period of probation, an arrest warrant was issued on February 28, 2013, alleging that Mr. Ellis had violated the terms of his probation. (R., p.501.) The following day, Mr. Ellis was arraigned before a magistrate based on the alleged probation violations. (R., p.501.) On March 7, 2013, Mr. Ellis was terminated for the mental health court, in both cases. (R., p.502.) On March, 18, 2013, the State filed, in both cases, a report of probation violation alleging that Mr. Ellis violated the terms of his probation. (R., pp.503-506.) Three days after the report of probation was filed, Mr. Ellis made his first appearance before the district court at a hearing which was scheduled for a probation violation admit/deny or evidentiary hearing. (R., pp.538-541; 03/21/13 Tr., p.16, Ls.12-16.)

At the beginning of that hearing, Mr. Ellis' trial counsel requested a continuance in order to obtain an updated mental health report. (03/21/13 Tr., p.3, L.15 - p.4, L.3.) The district court then said it was at the court house until seven p.m. the previous evening and found that this request was not credible and was merely a means to delay the proceedings. (03/21/13 Tr., p.6, Ls.10-14.) The district court also found, based on

Mr. Ellis' admission, that he was competent to proceed. (03/21/13 Tr., p.6, L.14 - p.7, L.2.)

The district court then asked Mr. Ellis how he was going to plead to the first allegation contained in the report of probation violation filed three days earlier. (03/21/13 Tr., p.5, Ls.5-10; R., pp.503-506.) Mr. Ellis then said he wanted to retain counsel. (03/21/13 Tr., p.7, Ls.11-12.) The district court said that Mr. Ellis had counsel, and again asked Mr. Ellis how he was going to plead. (03/21/13 Tr., p.7, Ls.13-14.) Mr. Ellis said that he was not prepared to go forward and that he had already spoken with a private attorney. (03/21/13 Tr., p.7, Ls.15-17.) Mr. Ellis then said that the attorney he had spoken to wanted Mr. Ellis to get the proceedings continued until April 8, 2013, which was approximately eighteen days later. (03/21/13 Tr., p.7, Ls.17-19.) The district court held that since the private attorney was not present and since Mr. Ellis had an attorney he was going to deny the motion for a continuance. (03/21/13 Tr., p.7, Ls.20-22.) Mr. Ellis then denied two of the allegations, but admitted that he violated the terms of his probation by driving without privileges. (03/21/13 Tr., p.7, L.22 - p.8, L.17; R., pp.503-506.) The State then withdrew the one of the remaining allegations and went forward to an evidentiary hearing on the other allegation. (03/21/13 Tr., p.8, L.18 - p.9, L.4; R., pp.503-506.) The district court then found that Mr. Ellis violated the terms of his probation by being terminated from mental health court. (03/21/13 Tr., p.15, Ls.19-23; R., pp.503-506.)

After finding that Mr. Ellis had violated the terms of his probation, the district court asked both parties if they were prepared to go directly to the disposition of the probation violations. (03/21/13 Tr., p.15, L.23 - p.16, L.1.) Mr. Ellis' trial counsel said that he was not prepared to go forward with the disposition of the probation violations because he

had two witnesses he wanted to call but had not been able to get into contact with. (03/21/13 Tr., p.16, Ls.2-9.) The district court asked why the witnesses were not present and trial counsel said that he was not on notice that the court was going to hold a disposition hearing on the probation violations. (03/21/13 Tr., p.16, Ls.10-16.) Trial counsel also told the district court that he only needed one week to be prepared for a disposition hearing and that it would only take approximately half-an-hour. (03/21/13 Tr., p.16, Ls.6-9.) The district court then asked trial counsel to provide an offer of proof as to the witnesses' potential testimony. (03/21/13 Tr., p.17, Ls.17-18.) Trial counsel said he was not quite sure what the testimony would be but it would probably indicate that he has not been drinking and driving. (03/21/13 Tr., p.16, L.19 - p.18, L.25.) Trial counsel then said Mr. Ellis would like to have his sponsor testify and his sponsor would say Mr. Ellis has been working a twelve-step program and remained sober. (03/21/13 Tr., p.18, Ls.1-6.) The district court then asked the State to opine about Mr. Ellis' request for a continuance as to the disposition hearing, and the State responded it had no position and would be available for the continued hearing. (03/21/13 Tr., p.17, Ls.9-12.) The district court then accepted all of trial counsel's representations regarding the offers of proof and denied Mr. Ellis' request for a continuance. (03/21/13 Tr., p.18, Ls.7-11.) The district court also noted that it would not consider any unproven allegations that Mr. Ellis had been drinking and driving. (03/21/13 Tr., p.18, Ls.11-19.) The district court revoked probation and imposed the underlying sentences. (R., pp.543-544.) At the end of the disposition portion of the probation violation proceedings, the district court explained that it denied the request for a continuance for appointed counsel because it thought the request was a delay tactic. (03/21/13 Tr., p.49, Ls.8-14.) Mr. Ellis timely appealed. (R., pp.545-547.)

ISSUES

1. Did the district court abuse its discretion when it denied Mr. Ellis' request for a continuance in order to retain private counsel?
2. Did the district court deny Mr. Ellis due process when it refused to continue the disposition portion of the probation revocation hearing, which was requested in order for Mr. Ellis to prepare a defense and call witnesses to testify on his behalf?

ARGUMENT

I.

The District Court Abused Its Discretion When It Denied Mr. Ellis' Request For A Continuance In Order To Retain Private Counsel

A. Introduction

Mr. Ellis argues that the district court abused its discretion when it denied his request for a continuance at the final probation violation hearing. Specifically, he argues that the district court abused its discretion when it denied his request for a continuance in order to retain counsel. As such, he argues that he was denied a right to retained counsel throughout his probation violation proceedings.

B. Standard Of Review

An abuse of discretion standard is used to determine whether a district court should have granted a request for a continuance. *State v. Ward*, 98 Idaho 571, 574 (1977). "When a district court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine whether the lower court correctly perceived the issue as one of discretion, acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it, and reached its decision by an exercise of reason." *State v. Knutsen*, 138 Idaho 918, 923 (Ct. App. 2003).

C. The District Court Abused Its Discretion When It Denied Mr. Ellis' Request For A Continuance In Order For Him To Retain Private Counsel

Generally, it has been held that unless an appellant shows that his substantial rights have been prejudiced by reason of a denial of his motion for continuance, appellate courts can only conclude that there was no abuse of discretion. *State v.*

Laws, 94 Idaho 200, 202 (1971). The Idaho Supreme Court held that “probationers have an unqualified federal due process right to retained counsel at probation revocation hearings” *State v. Young*, 122 Idaho 278, 283 (1992). “Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons.” *State v. Cagle*, 126 Idaho 794, 797 (Ct. App. 1995). “[O]nly an unreasoning and arbitrary ‘insistence upon expeditiousness in the face of a justifiable request for delay’ violates the right to assistance of counsel. *State v. Carman*, 114 Idaho 791, 793 (Ct. App. 1988) (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)). “Therefore, a request for new counsel should be examined with the rights and interests of the defendant in mind, tempered by exigencies of judicial economy.” *Id.* Idaho appellate courts analyze the following factors when evaluating a district court’s order denying a request for a continuance in order to obtain substitute counsel:

[T]he timing of the motion; the requested length of delay, including whether the delay is an attempt to manipulate the proceedings; the number, if any, of similar continuances sought by the defendant; inconvenience to witnesses; any prejudice to the prosecution; whether an irreconcilable conflict exists between the accused and counsel; and the qualifications possessed by present counsel.

Cagle, 126 Idaho at 797. An application of the foregoing factors leads to the conclusion that the district court abused its discretion when it denied Mr. Ellis’ request for a continuance in regard to his mental health issues.

The timing of the motion in this matter supports Mr. Ellis’ position. Mr. Ellis recognizes that his motion for the continuance occurred on the day of his probation violation hearing. (03/21/13 Tr., p.3, Ls.1-20.) However, there was very little time in this matter for Mr. Ellis to prepare for that hearing, because the report of the probation

violations which contained the official allegations against Mr. Ellis was filed on March 18, 2013, and the probation violation hearing was held three days later on March 21, 2013. (03/21/13 Tr., p.3, Ls.1-20.)

Mr. Ellis' ability to prepare for this hearing was impeded by his unstable mental health condition. (03/21/13 Tr., p.5, Ls.16-19.) Specifically, trial counsel told the district court that Mr. Ellis was "extremely overwhelmed" at the hearing and that he had made a request with his medical provider, Dr. Rhodes, months before the probation hearing in order to get his medications changed. (03/21/13 Tr., p.3, L.15 - p.4, L.3.)

Mr. Ellis' claims that he was mentally unstable are credible as he was previously found a viable candidate for mental health court. (R., pp.415-435, 469-500; PSI, p.140.) During the hearing, the district court also found that Mr. Ellis' claims that he was not stable on his medications was not credible because it was the first time in three years he had heard such a claim. (03/21/13 Tr., p.48, Ls.3-6.) However, at the July 19, 2010, mental health court hearing, Mr. Ellis claimed his medications were outdated. (R., p.472.) At the December 13, 2012 hearing, he was not taking his medications. (R., p.490.)

The length of the delay and the State's prejudice are not significant factors in this matter. Mr. Ellis only requested an eighteen-day delay. (03/21/13 Tr., p.7, Ls.15-19.) Mr. Ellis had already communicated with private counsel about the eighteen-day delay, which ensured that private counsel would make an appearance for Mr. Ellis. (03/21/13 Tr., p.7, Ls.15-19.) When asked about the continuance in regard to the updated mental health evaluation, the State did not object to a continuance, which evinces a lack of perceived prejudice by the State. (03/21/13 Tr., p.4, L.21 - p.5, L.6.) Additionally, this was only a probation hearing so there was no jury empanelled at the time of the request

for the continuance. (03/21/13 Tr., p.3, Ls.1-11.) The State only called two witnesses at the evidentiary portion of the hearing. (03/21/13 Tr., p.8, L.1 - p.14, L.18.) Additionally, this was the first request for a continuance. (R., pp.501-502, 538.)

In sum, Mr. Ellis only had three days between the filing of the report of his alleged probation violations and the probation revocation hearing. Mr. Ellis told the district court that he was not mentally stable enough to go forward with the proceedings and needed a continuance in order to be represented by retained counsel. Only at the end of the disposition portion of the proceedings did the district court explain that it thought the request for a continuance to retain substitute counsel was a delay tactic. However, that concern is far outweighed by Mr. Ellis' right to retained counsel at a probation violation disposition hearing.

II.

The District Court Denied Mr. Ellis Due Process When It Refused To Continue The Disposition Portion Of The Probation Revocation Hearing, Which Was Requested To Afford Mr. Ellis The Opportunity To Prepare A Defense And Call Witnesses To Testify On His Behalf

A. Introduction

Mr. Ellis argues that the district court violated his due process rights when it failed to grant his request for a continuance of the disposition portion of the probation violation proceedings. Specifically, he argues that he was never provided notice that the March 21, 2013 hearing, was scheduled for a disposition hearing. Mr. Ellis also argues that due to the foregoing error, his due process rights were further violated because he was also precluded from preparing a defense and calling witnesses on his

behalf. As such, this case must be remanded for another probation violation disposition hearing and Mr. Ellis must be afforded the opportunity to call witnesses.

B. Standard Of Review

The applicable standard of review regarding a district court's decision to deny a continuance is contained in Section IB, *supra*, and is incorporated herein by reference thereto.

C. The District Court Denied Mr. Ellis Due Process When It Refused To Continue The Disposition Portion Of The Probation Revocation Hearing Which Was Requested To Afford Mr. Ellis The Opportunity To Prepare A Defense And Call Witnesses To Testify On His Behalf

Generally, it has been held that unless an appellant shows that his substantial rights have been prejudiced by reason of a denial of his motion for continuance, appellate courts can only conclude that there was no abuse of discretion. *State v. Laws*, 94 Idaho 200, 202 (1971). A probationer is entitled to State and Federal due process protections throughout the probation revocation proceedings. *State v. Kelsey*, 115 Idaho 311, 314 (1988). These due process protections include a right to notice and two hearings. *State v. Chapman*, 111 Idaho 149, 150-151 (1986). The first hearing is to determine whether the probationer violated a term of the probation agreement. *Id.* at 151. "The second hearing is one to determine if the [probation] violation justifies revocation of [probation]." *Id.* Additionally, a probationer has a due process right to prepare and present witnesses during the probation revocation proceedings. *Id.* Mr. Ellis argues that his substantial rights to due process were violated when the district court denied his request for a continuance of the probation violation disposition hearing.

The following events are the basis for Mr. Ellis' due process claims. After Mr. Ellis admitted to one of the probation violation allegations and the district court

found that Mr. Ellis violated a term of his probation agreement, the district court asked the State if it was ready to proceed to the disposition of the probation violations and the State said it was prepared. (03/21/13 Tr., p.15, Ls.19-25.) When Mr. Ellis was asked the same question, the following dialogue occurred:

Trial Counsel: No, Your Honor. I would like the opportunity, in speaking with Mr. Ellis, to call a couple of witnesses on his behalf. Specifically, I'm thinking about calling his mother and his girlfriend. His mother's not here today. I have not been able to get a hold of her, and so I would ask the Court to set this out for next week. I can be prepared to go on Thursday and have my witnesses all lined up.

The Court: [W]hat is the reason why those witnesses aren't here today?

Trial Counsel: Well, Your Honor, this was just simply the admit/deny hearing on it, and he did deny. We went directly to evidentiary, and I guess at this point in time that's all I can let the Court know. They simply are not here.

The Court: All right. What, as an offer of proof, would these witnesses testify about?

(03/21/13 Tr., p.16, Ls.1-18.) Trial counsel noted that the State recommended prison and Mr. Ellis was going to request probation. (03/21/13 Tr., p.16, Ls.19-25.) Trial counsel then said that his mother would testify that Mr. Ellis has been doing well on probation and provided some other mitigating information. (03/21/13 Tr., p.17, Ls.1-9.) The district court asked the State what its position was as to the request for a one-week continuance, and the State said it had no opinion and would be available for the a disposition hearing the following week. (03/21/13 Tr., p.17, Ls.9-12.) Trial counsel then said he anticipated that he would not need more than one-half hour to conduct the hearing. (03/21/13 Tr., p.17, Ls.13-14.)

The district court then asked trial counsel what his mother would specifically testify about. (03/21/13 Tr., p.17, Ls.15-16.) Trial counsel responded, "Well, your honor, I don't know. I'm assuming that she - - I'm not quite sure, to be honest with the Court. I think she can testify that he has lived with her and, . . . has seen him in the community. (03/21/13 Tr., p.17, Ls.17-20.) Trial counsel also said that she would rebut allegations that Mr. Ellis had been drinking and driving while on probation. (03/21/13 Tr., p.17, Ls.20-25.) Trial counsel then stated that Mr. Ellis wanted his "sponsor" to testify that Mr. Ellis was "clean and working the steps." (03/21/13 Tr., p.18, Ls.1-6.) The district court accepted the offers of proof as the truth and said it would not consider any unproven allegations that Mr. Ellis had been drinking and driving, denied the request for a continuance, and proceeded to disposition. (03/21/13 Tr., p.18, Ls.18, Ls.7-19.)

Mr. Ellis first argues that his due process rights were violated because he never received notice that the March 21, 2013 hearing, was going to include the disposition portion of the probation revocation proceedings. As stated above, probationers have a due process right to notice as to both the guilt phase and the disposition phase of the probation violation proceedings. *Chapman*, 111 Idaho at 151. According to trial counsel, Mr. Ellis was only put on notice that the March 21, 2013 hearing was scheduled for an admit/deny hearing, not a disposition hearing. (03/21/13 Tr., p.16, Ls.2-16.) It is also important to note that trial counsel requested a continuance as he was not prepared for disposition due to the lack of notice.

Based on the lack of notice, Mr. Ellis also argues that his due process rights were violated when the district court refused to grant the continuance to afford Mr. Ellis the opportunity to prepare a defense and call witnesses on his behalf. As mentioned

above, a probationer has a due process right to prepare a defense and call witnesses during probation violation proceedings. *Chapman*, 111 Idaho at 151. Even if a probationer is denied this right s/he must also establish prejudice, which requires the probationer to make a showing that the witnesses' testimony would have been material and favorable. *State v. Hanslovan*, 116 Idaho 266, 268 (Ct. App. 1989); See also *Bradford v. State*, 124 Idaho 788, 792 (Ct. App. 1993). In this case, the district court provided Mr. Ellis an opportunity to make the required showing and he complied with the requirement. (03/21/13 Tr., p.16, L.19 - p.18, L.6.) Specially, he said he would call his mother and his sponsor and they would rebut any allegations that he was drinking and driving and that he was doing well on probation. (03/21/13 Tr., p.16, L.19 - p.18, L.6.) His sponsor would also testify he was working the steps of a rehabilitation program. (03/21/13 Tr., p.18, Ls.1-6.) This information is both material and favorable for Mr. Ellis, because when determining whether to revoke or continue probation, a district court must analyze the goals of protection of society and rehabilitation. *State v. Leach*, 135 Idaho 525, 529 (Ct. App. 2001). Mr. Ellis' offers of proof directly concern these two goals. As such, Mr. Ellis can establish that the district court's denial of his request for a continuance violated his due process right to call witnesses and that he was prejudiced because of that denial.

Mr. Ellis recognizes that the State will probably argue that the denial of the continuance was harmless because the district court accepted Mr. Ellis' offers of proof as to the witnesses' testimony. (03/21/13 Tr., p.18, Ls.7-19.) However, affirming the district court on that basis would allow the district court to circumvent the due process rights mandated by the Idaho Supreme Court in *Chapman, supra*. The notion that a probationer has a due process right to call witnesses becomes meaningless if a trial

court only needs to ask the probationer what the witnesses would say, then accept the offers of proof as the truth and deny the probationer an opportunity to call the witnesses. Moreover, since a probationer is required to provide a summary of their witnesses' testimony in order to establish prejudice on an appeal from an order denying a request for a continuance, using that offer of proof as a substitute for the witnesses' actual testimony means there is no actual right to call witnesses at a probation revocation proceedings because such a practice denies a probationer a remedy for a violation of that right to call witnesses. See *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.")(quoting William Blackstone, Commentaries (3d vol. *23)). Even assuming the error is harmless, the district court's acceptance of the offers of proof did not overcome the due process violations of Mr. Ellis' right to notice and to prepare a defense.

Mr. Ellis further argues that the denial of his request for a continuance was "only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay,'" which violated his right to prepare a defense and call witnesses. *Carman*, 114 Idaho at 793 (quoting *Ungar*, 376 U.S. at 589). The request for the continuance was only for a week-long delay, and the State had no objection and said it was available for the hearing. (03/21/13 Tr., p.16, Ls.6-9, p.17, L.9-14.) While the district court provided reasons why it denied the request for a continuance for Mr. Ellis mental health issues and his request for counsel (03/21/13 Tr., p.5, L.20 -p.7, L.10, p.49, Ls.8-17), there was no expressed rationale provided by the district court for denying his request for a continuance of the disposition portion of the probation proceedings, other than the district court's acceptance of Mr. Ellis' offers of proof as to

the content of his witnesses' testimony. However, that rationale, as argued above, is circular and denied him a remedy for a denial of his right to call witnesses. As such, due to the district court's lack of an explanation for denying Mr. Ellis request for a continuance and due to the State's lack of an objection, the district court's denial of a request for a continuance was unreasoned and arbitrary.

In sum, Mr. Ellis was not put on notice that the March 21, 2013 hearing, was going to include the disposition portion of the probation revocation proceedings and, due to that lack of notice, he was not able to prepare a defense and call witnesses during that portion of the proceedings. The district court provided no rationale for its decision to deny this specific request for a continuance and the State did not object to the continuance. As such, the district court's decision to deny the continuance was unreasoned and arbitrary and violated Mr. Ellis' due process rights to notice, to prepare a defense, and to call witnesses on his behalf. As such, this matter must be remanded for further proceedings.

CONCLUSION

Mr. Ellis respectfully requests that this Court remand this matter for further proceedings.

DATED this 21st day of March, 2014.



SHAWN F. WILKERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of March, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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